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No. 126.

# Supreme Court of the United States

OCTOBER TERM, 1944.

CHARLES E. MERRILL, PETITIONER.

VS.

JOHN L. FAHS, UNITED STATES COLLECTOR OF INTERNAL REVENUE FOR THE DISTRICT OF FLORIDA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

## BRIEF FOR PETITIONER.

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## BRIEF FOR PETITIONER.

### OPINIONS BELOW.

The opinion of the district court (R. 52-57) is reported at 51 F. Supp. 120. The opinion of the circuit court of appeals (R. 67-97) is reported at 142 F. 2d 651.

## JURISDICTION.

The judgment of the circuit court of appeals was entered May 3, 1944 (R. 78). Petition for a writ of certiorari was filed June 3, 1944, and granted October 9, 1944. The jurisdiction of this court was invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

## QUESTION PRESENTED.

In 1939 the petitioner transferred funds to an irrevocable trust for the benefit of his wife in accordance with the terms of an antenuptial agreement between them.

The question is whether the amount of this transfer is taxable as a gift under the provisions of Section 501 of the Revenue Act of 1932; the answer depends upon whether the transfer was made upon "adequate and full consideration in money or money's worth" within the meaning of Section 503 of that Act.

## STATUTES AND REGULATIONS INVOLVED.

The pertinent statutes and regulations are set forth in the appendix, *infra*, page 29.

## STATEMENT.

The facts which were found by the district court (R. 45-51) from the parties' stipulation (R. 5-10) and from certain documentary exhibits (R. 10-45) may be stated as follows:

The petitioner was born in 1885 in Florida, of which state he was a citizen during the pertinent taxable year. He was a citizen of New York, however, at the time of the proceedings herein (R. 45).

On March 8, 1939, petitioner was married to Miss Kinta Desmare at Pensacola, Florida. At the time of the marriage petitioner's net worth was in excess of $5,300,000 (R. 7); Miss Desmare's net financial worth at that time was negligible (R. 46).

Miss Desmare had never previously been married but petitioner theretofore had been twice married and divorced. By the first wife he had two children, both of whom were then living and one of whom was married and had two children. Petitioner also had another child living, the issue of his second marriage. Shortly before his marriage to Miss Desmare petitioner had been called upon to defend a divorce proceeding in which heavy money demands were made upon him by his second wife; he desired to safeguard and protect his dependents against future contingencies and the obligations which he had (R. 46).

Before making any definite matrimonial arrangements with Miss Desmare, petitioner consulted his attorney with reference to the Florida dower statute and the feasibility of making a valid prenuptial agreement to adjust property rights between himself and his prospective wife. Being informed as to such matters, petitioner told Miss Desmare of his previous marital affairs and of his desire to provide for his family by previous marriages. He also advised her of his financial condition and the nature of his business and informed her of his wish to enter into a prenuptial agreement (R. 46).

Miss Desmare was agreeable to the idea and preferred some form of immediate payment in consideration and exchange for any statutory dower, widow's allowance, or other rights to which she would become entitled by the contemplated marriage (R. 46).

As a result of these conferences an antenuptial agreement was prepared and executed by the parties at Pensa-

cola, Florida, on March 7, 1939, the day prior to their marriage (R. 46). After reciting (R. 10-12) the reasons and motives of the contracting parties, the antenuptial agreement stated (R. 12-16)—

> That in consideration of the premises and of the solemnization of the aforesaid intended marriage and of the sum of One ($1.00) Dollar paid by the first party [taxpayer] to the second party [Miss Desmare]
> * * *
>
> I
>
> * * * [the second party] has granted, remised, released, relinquished, conveyed and forever quit-claimed and by these presents does grant, remise, release, relinquish, convey and forever quit-claim upon the said Charles E. Merrill, party of the first part, his heirs, personal representatives and assigns:
>
> (a) All of the right, title and interest which she may acquire as wife or widow of the first party in all of the lands, tenements and hereditaments of which the first party may be seized at the time of the marriage of the parties or at any time thereafter.
>
> (b) All of the right, title and interest which she may acquire as the wife or widow of the first party in and to any and all personal property, tangible or intangible, which the first party may own at the time of the marriage or at any time thereafter.
>
> This conveyance includes all properties, wheresoever situated, and every right pertaining thereto whether of dower, election, participation, inheritance or other title or allowance. Second party hereby waives, discharges and releases every interest, claim or demand of whatsoever kind or description, in law or in equity, that may accrue to her or which she may hereafter acquire as wife or widow, in the real and personal property now or hereafter owned by the first party; so that neither the second party nor her heirs,

executors, administrators or assigns, or any of them, shall have or be entitled to assert any right, claim or demand whatsoever against any of the properties or estate of the first party but shall be forever barred and excluded therefrom.

The second party agrees that she will at any time and from time to time upon the request of the first party or his heirs, executors, administrators or assigns, execute, acknowledge and deliver any and all mortgages, deeds of conveyance, bills of sale or instruments of release of any of the real or personal property of which the first party may be seized or possessed at the time of the marriage of the parties or at any time thereafter, so that such mortgages or instruments of conveyance or release when executed and recorded, may show good record title to the properties thereby encumbered, conveyed or affected: The first party or his heirs, executors, administrators or assigns, shall nevertheless have the right to encumber or convey or otherwise deal with reference to any or all of such real or personal properties without the second party joining in the mortgages or instruments of conveyance and every such mortgage or other instrument, without the signature of the second party, shall fully and effectively encumber or convey or operate upon the property affected thereby.

Petitioner's undertakings, as set forth in the antenuptial agreement (R. 10-16), included the following (R. 13, 48):

(a) That within ninety days from the date of said marriage, he will create an irrevocable trust, of $300,000.00 in cash or securities of equivalent value, the provisions of which shall conform to the wishes heretofore expressed by the said Kinta Desmare, that is to say the trust indenture shall provide for the said Kinta Desmare to receive during and throughout her lifetime the net annual income from said trust funds, such income to be paid her quarterly; upon the death of the said Kinta Desmare, if she be survived by her

> mother Mrs. Louis Desmare, the income from the trust funds to be paid to said mother during and throughout her lifetime; upon the death of the said Kinta Desmare, if she be not survived by her mother or upon the death of the latter, if she shall survive her said daughter, the entire trust estate to become the property of and the principal and net income therefrom to be disbursed and paid as follows * * *.

In addition to the foregoing, petitioner agreed to provide by will an additional trust of $300,000 for Miss Desmare's benefit; a testamentary trust in that amount was also to be created by him for the benefit of their issue if any (R. 14-15).

The contract provided for its construction in accordance with the laws of the State of Florida (R. 16).

Pursuant to this agreement petitioner created an irrevocable trust to which he transferred $300,000 in cash on May 29, 1939.[1] On that date also petitioner executed his will which contained clauses designed to carry out the additional provisions of the ante-nuptial contract (R. 48-49). Prior to their execution, the trust indenture and will were approved by the personal attorney of the third Mrs. Merrill, as conforming in all respects to the requirements of the agreement (R. 49).

The several transactions between petitioner and Kinta Desmare were entered into in good faith (R. 7, 49).

On May 29, 1939, when the $300,000 was transferred to the Desmare trust, petitioner's net worth (apart from the creation of the trust fund on that date) was approximately the same as it had been on March 7, 1939, the date of execution of the pre-nuptial contract, and on March 8, 1939, the date of petitioner's marriage to Miss Desmare (R. 49). His assets consisted principally of cash, stocks,

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[1]The terms of the trust are set forth at pp. 17-23 of the record.

bonds, and similar securities of a value in excess of $5,300,000. In addition he owned his Palm Beach home valued at $100,000 and other Florida real property valued at $35,000 (R. 49).

The dower statute of Florida in effect at the date of the prenuptial agreement was Section 5507 (1), Compiled General Laws of Florida. It specified (R. 49) that the widow of any decedent might elect to take dower—

> which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, however, that if a decedent be survived by his widow, and lineal descendants and that none of such lineal descendants are also the lineal descendents of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration.

On March 7, 1939, the date of execution of the prenuptial contract, Miss Desmare was 35 years of age and petitioner was 53 (R. 49). An actuarial calculation based upon the Actuaries or Combined Experience Table of Mortality, with interest at 4 percent, was introduced into evidence before the district court under a stipulation of the parties admitting its correctness "if it is possible to place a money value upon the wife's dower interest under the

facts in this case"; the calculation showed that the reversionary interest of a person aged 35 in a fund becoming payable upon the death of a person aged 53 per $1 of the fund is .422604 (R. 34, 49).

On May 11, 1940, petitioner filed with the commissioner of internal revenue his gift tax return for the year 1939 in which he reported the creation of the irrevocable trust and the transfer to it of $300,000, and stated that (R. 25):

> This trust was created pursuant to an ante-nuptial agreement executed March 7, 1939, between the taxpayer and his wife, wherein, in consideration of the solemnization of the marriage and Mrs. Merrill's promise to release and relinquish her inchoate dower and other marital rights in his property, the taxpayer agreed to create this trust for the benefit of his wife, her mother, and the remaindermen designated by Mrs. Merrill in said agreement * * *
>
> In view of the net worth of the taxpayer and the value of the real estate and other property owned by him at the time the trust was created and the other circumstances set forth in said ante-nuptial agreement, and in view of the absence of any donative intent on the part of the taxpayer, he has excluded the amount of the transfer to this trust from Schedule A of the Gift Tax Return for 1939 on the ground that the relinquishment by Mrs. Merrill of her inchoate dower and other marital rights in his property constituted a valuable consideration in money or money's worth at least equal to the sum of $300,000, the amount transferred to the trust in question.

Mrs. Merrill also filed a timely gift tax return for the year 1939, reporting the trust created for her pursuant to the antenuptial agreement and saying (R. 43)—

> The taxpayer is advised that she became a purchaser of the corpus of this trust for a consideration

commensurate with the amount of said corpus, to wit, $300,000.

In filing their income tax returns for the calendar year 1939, neither taxpayer nor his wife, the former Kinta Desmare, reported income or profit on these transactions (R. 50).

The commissioner assessed the instant gift tax deficiency on the ground that petitioner's transfer of $300,000 to the trust in 1939 was subject to the gift tax for that year. Petitioner paid the amount so assessed, filed due claim for refund, and instituted this suit upon the commissioner's rejection of the claim (R. 50-51). The district court held (R. 52 *et seq.*) that the release of a wife's statutory property rights may constitute full and adequate consideration in money or money's worth for a transfer to her by the husband, within the meaning of Section 503 of the Revenue Act of 1932; that whether or not it does constitute such consideration is a question of fact; and that in the case at bar the evidence established that Miss Desmare's release of her statutory rights under the prenuptial agreement did constitute adequate and full consideration in money or money's worth for the transfer by petitioner in 1939 of the $300,000 here involved.

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of monetary evaluation and therefore that its adequacy could not be and was not here established (R. 67-72). A dissenting opinion below (R. 72-97) was of the view that the consideration was susceptible of evaluation and that its adequacy had been established.

## ARGUMENT.

Petitioner contends that this case was correctly decided by the District Court and improperly reversed by the Circuit Court of Appeals for the Fifth Circuit.

The facts having been previously stated, it would seem unnecessary to do more than comment briefly upon the transaction giving rise to this controversy.

Petitioner and Miss Desmare, executed a prenuptial agreement which was admittedly valid under Florida law.[2] In consideration of his immediate transfer of the funds for which a gift tax has been exacted,[3] she released all of her statutory rights as wife and/or widow in his property and estate. These rights were then defined by Chapter 18066, Laws of Florida, Acts of 1937; Section 5507(1) Compiled General Laws of Florida, as amended. This statute is quoted in appendix hereto. At the time of the marriage Mr. Merrill was 53 years of age and Mrs. Merrill 35; he then had three living children and two grandchildren. The dower statute gave her a 25% inchoate interest in all of his real and personal property, free from all liability for debts, estate and inheritance taxes and charges and expenses of administration.

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[2]The Florida Supreme Court has repeatedly recognized the validity of prenuptial agreements of the kind here involved: *Weeks* v. *Weeks*, 143 Fla. 686, 197 So. 395; *Northern Trust Co.* v. *King*, 149 Fla. 611, 6 So. 2d 539; *North* v. *Ringling*, 149 Fla. 739, 7 So. 2d 476.

[3]By the prenuptial contract, petitioner further agreed that, if his wife survive him, he will provide by his will an additional $300,000 for her benefit. As will be observed from the district court opinion, this promise was taken into account in computing the value of her release. Undoubtedly such a bequest will not be deductible before estate taxes.

In Florida, the right of dower is an interest contingent during the life of the husband but rendered absolute by his death; the right is not derived through her husband but is cast upon the widow by law; it is more liberal than dower at common law, is antagonistical to his estate and preferred over the rights of creditors.[4]

At the time of the prenuptial agreement Mr. Merrill was worth in excess of $5,300,000 net, one-fourth of which would have been at least $1,325,000. In weighing the economic effect of the contemplated third marriage upon his plans for the future, Mr. Merrill saw how the drastic provisions of the Florida dower statute might not only penalize him in certain contingencies but also seriously interfere with the working out of any comprehensive plan for the welfare of his children. Accordingly he desired to dispose once and for all of the wife's contingent claims. The prenuptial agreement (R. 10) recites and the stipulation of facts (R. 6) amplifies the motives impelling its execution.

The case presents a single question of law and although that question might be stated in various ways, we are agreeable to and have adopted respondent's statement of the question as it appears in his (certiorari) memorandum at page 2.[5] Later, on page 16 of that memorandum, respondent divides the question into two parts saying "The real questions involved in the present case are whether the clear meaning of Section 804 of the Revenue

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[4]At an early date, the Supreme Court of Florida, in *Smith* v. *Hines*, 10 Fla. 258, considered, analyzed and clearly stated the nature of dower in Florida. Excerpts from that opinion are given in appendix to this brief. The principles announced by that decision have been reaffirmed repeatedly. See *Henderson* v. *Usher*, 125 Fla. 709, 170 So. 846; *Finlayson* v. *Love*, 44 Fla. at 556; *Catlett* v. *Chestnut, Exr.*, 100 Fla. 1146, 131 So. 120; *Herzog* v. *Trust Co. of Easton*, 67 Fla. 54, 64 So. 426.

[5]The question is herein stated on page 2.

Act of 1932 * * *, in the light of its history * * *, does not require that the same meaning be attached to section 503 * * * here involved and, if it does not, whether the nature of the marital rights relinquished does not prevent a value in money or money's worth from being assigned to them under the later section."

We will address our argument to the question as thus divided and first to the proposition that:

**Congress did not intend the interpretative restriction placed around the estate tax by Section 804 of the Revenue Act of 1932 to apply to the gift tax provisions (Section 503) of that act.**

This is purely a question of statutory construction but, as respondent has indicated, it requires some consideration of the history of the legislation. To aid in construing the law we also have the committee reports.[6] Then again we have the well settled rule that statutes levying taxes are not to be extended by implication beyond the clear import of the language used and, in case of doubt, are construed most strongly against the government.[7]

The Revenue Act of 1932 contains nine separate subdivisions or titles. By Title III of that act a new tax was created and imposed on gifts. Title II of the act imposes an additional estate tax and Title VI provides for certain estate tax amendments.

Prior to the amendment of the Estate Tax Law by Section 804 of the 1932 Act, (which adds certain new matter to Section 303(d) of the 1926 Estate Tax law), the estate tax statute was silent as to what might constitute consideration. In several estate tax cases the federal

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[6]See Committee Reports in appendix hereto.

[7]*Gould* v. *Gould*, 245 U. S. 151, 62 L. Ed. 211; *United States* v. *Merriam*, 263 U. S. 179, 68 L. Ed. 240.

courts had held release of dower rights to be a money's worth consideration.[8] The amendment in section 804, (Title VI—Estate Tax amendments), provides for the first time, that "for the purpose of this title (the Estate Tax Title) a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration in money or money's worth." *Those provisions are not however written into the gift tax law.*

There is no congressional intention completely to integrate gift and estate taxes; *Commissioner* v. *Beck's Estate*, (C. C. A. 2) 129 F. 2d 243, and cases cited. The rule that the two taxes are *in pari materia* and must be considered together[9] serves only to here emphasize the Congressional intent to distinguish between marital rights as a consideration of value in *bona fide inter vivos* transactions as compared with transactions intended to become effective only upon death.

It seems clear that Congress has not as yet achieved, or even intended to achieve, integration of the gift, estate and income tax laws. Proof of this are the many instances of double taxation; Cf. *Higgins* v. *Commissioner*, 129 F. 2d 237, 239-240 (C. C. A. 1, 1942), and the proposed plans for the integration of these laws, *e. g.*, Griswold, A Plan for the Co-ordination of the Income, Estate, and Gift Tax Provisions with Respect to Trusts and Other Transfers (1942), 56 Harv. L. Rev. 337.

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[8] *Ferguson* v. *Dickson*, (C. C. A. 3) 300 Fed. 961; *McCaughn* v. *Carver*, (C. C. A. 3) 19 F. 2d 126; *Stubblefield* v. *U. S.*, (Court of Claims) 6 F. Supp. 440; *Mason* v. *U. S.*, (D. Ct. Fla.) 17 F. 2d 317.

[9] *Burnet* v. *Guggenheim*, 288 U. S. 286; *Sanford's Estate* v. *Commissioner*, 308 U. S. 39.

In this case we are concerned only with a proper interpretation of the gift tax law. The government contends that because the estate law says one thing the gift law should say the same. Perhaps it should but, if so, the remedy is with Congress rather than the courts. *Commissioner* v. *Beck's Estate, supra.* Had Congress intended the interpretative restriction placed around the estate tax to likewise apply to the gift tax, it doubtless would have plainly said so. Its omission to impose such a restriction upon *inter vivos* transactions must have been deliberate and intentional and we think the committee reports so indicate. This court will not ordinarily go beyond committee reports to construe a federal statute.[10] The scope and limitation of the estate tax amendment is quite forcefully indicated by the illustrative example given in the committee report on section 804.[11] The Revenue Act of 1926 had required the interest of a surviving spouse, such as dower, to be included in any valuation of a decedent's gross estate and the 1932 amendment was intended to make that provision plain beyond preadventure; it undertook to emphasize that an agreement providing for the widow to accept a stated sum in lieu of dower should not operate to exclude from the gross estate the value of her dower rights. Her claim in such circumstances is not to be considered for estate tax purposes as one deductible from the gross estate. There is nothing to indicate that Congress intended to inject such dower provision into the gift tax law or promulgate any new rule governing *bona fide, inter vivos* transactions, actually consummated between husband and wife or, as in this case, between parties contemplating matrimony. To the contrary, there is every indication that

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[10] *Lapina* v. *Williams*, 232 U. S. 78, 58 L. Ed. 515.

[11] Shown in appendix, *infra*, page 30.

Congress intended the gift taxing statute to be a complete legislative enactment in its own right. Congress knew of the above mentioned federal decisions holding the wife's relinquishment of her statutory rights to be a money's worth consideration and did not see fit to disturb that rule for gift tax purposes. We are not here dealing with an agreement to become effective only after death—we are dealing with a consideration executed while the parties are alive, in good health and with a considerable life expectancy; nor is their good faith questioned by the government.

We are not without authority to support our viewpoint. The opinion of the board of tax appeals in the case of *Bennet B. Bristol* v. *Commissioner of Internal Revenue*, 42 B. T. A. 263, adopted the same theory and reasoning. On the facts that case was quite similar to the case at bar and it was said in the opinion rendered that:

> "The gift tax under consideration was imposed by the Revenue Act of 1932, the same act that amended the 1926 Act respecting estate tax as above noted. Both the gift tax provisions and the estate tax amendment were considered in the same Congressional Committee reports. Nevertheless, the amendment was made specifically applicable to the estate tax and was omitted from the gift tax provisions. The only logical conclusion in the light of such facts is that, with both taxes before it, the Congress did not intend the interpretative restriction placed around the estate tax to apply to the gift tax and that the omission thereof from the gift tax provisions was deliberate. We are of the opinion, accordingly, that the relinquishment of dower or other marital rights may, under the gift tax statute, be adequate and full consideration in money or money's worth. The adequacy of the consideration in a given case is a question of fact."

While it is true that this decision of the board of tax appeals was later reversed by the Circuit Court of Appeals for the First Circuit (121 F. 2d 129), the viewpoint of that court upon this question of Congressional intent and statutory construction has proved unpalatable to the tax court (*Jones, Petitioner*, v. *Commissioner*, 1 T. C. 1207; *Wemyss, Petitioner*, v. *Commissioner*, 2 T. C. No. 111) and has been rejected by the Court of Appeals for the Seventh Circuit (*Lasker* v. *Commissioner*, 138 F. 2d 989). In the instant case such a theory was rejected by the district court and even the Fifth Circuit Court of Appeals pushed it aside.

We submit that Congress did not intend for the interpretative restriction placed around the estate tax to apply to the gift tax law.

This brings us to the next proposition which is that:

**In bona fide transactions between parties contemplating matrimony, release of the wifes statutory rights may (within the purview of Section 503, Revenue Act of 1932), constitute an adequate and full money's worth consideration for a contemporaneous transfer of property by the husband.**

In the instant case, petitioner's transfer of $300,000 to the trust has been adjudged a gift and taxed as a gift; and this notwithstanding the complete absence of donative intent and the fact that the parties admittedly (R. 7) dealt in good faith. The commissioner has defined gifts as excluding arm's length business transactions in which there was no donative intent; Regulations 79, Articles 1, 2 and 8, approved February 26, 1936. Certainly this transfer does not conform to the term "gift" as that word is customarily used and understood and yet it was said in *Commissioner* v. *Montague*, (C. C. A. 6) 126 F. 2d 948, 951:

> "The word 'gift' is not defined in the act; therefore it is to be understood in its ordinary signification."

And, further:

> "The word 'gift' is usually defined as a voluntary transfer of property by one to another without any consideration or compensation therefor. A 'gift' is a gratuity and not only does not require consideration, but there can be none. If there is a consideration for the transaction, it is not a 'gift.'"

To same effect see *Ellerson* v. *Grove*, (C. C. A. 4) 44 F. 2d 493.

To circumvent this barrier, respondent argues that there was here no consideration and there could be no consideration such as the act contemplates, because no money value whatsoever may be attached to the statutory rights relinquished by the wife. The contention in the circuit court of appeals was that "the statute does not contemplate that the release of such rights shall constitute consideration to *any* extent." That seems to be the real debatable point upon which the government relies to sustain the tax for, if it is possible to place a money or money's worth value upon such rights, it was by the original stipulation agreed (R. 9) that the formula and computation of that value as submitted by petitioner to the trial court is correct.

It may be advisable to first consider what is contemplated by the words "consideration in money or money's worth."

In Restatement of the Law of Contracts, page 80, Section 75, we find the following definition of "consideration":

> "Consideration for a promise is (a) an act other than a promise, or (b) a forebearance, or (c) the

creation, modification or destruction or a legal relation, or (d) a return promise, bargained for and given in exchange for the promise."

And in *Turner* v. *Commissioner*, (C. C. A. 3) 85 F. 2d 919, it was pointed out that "money's worth" within the meaning of the statute does not mean money itself; the ultimate question is what may be regarded as money's worth. In that case a claim against a decedent's estate was held deductible as one "contracted for adequate and full consideration in money or money's worth or as a transfer to a religious, charitable or educational association."

In *Sanford's Estate* v. *Commissioner*, 308 U. S. 39, 84 L. Ed. 20, this court said in part:

> "When the gift tax was enacted Congress was aware that the essence of a transfer is the passage of control over the economic benefits of property rather than any technical changes in its title."

The court was undoubtedly speaking of a transfer by the donor; but in determining whether such transfer should be classified as a gift or as an exchange for consideration, the same test is applicable. Accordingly the rule may be stated in reverse somewhat as follows: "The essence of money's worth consideration for a transfer is the passage of control over the economic benefits of the consideration rather than any technical changes in the title."

If this thought be considered in connection with petitioner's acquisition of his wife's statutory rights, it becomes readily apparent that those rights did represent a money's worth consideration flowing to him in exchange for the money he transferred to the trust.

The same thought may be further developed in this wise: Assume the case of a man and woman, both wealthy. They contemplate matrimony and she, desiring to avoid any further accumulation, by valid agreement and

for a nominal consideration, releases to him all of her marital rights in his property and estate. Does this transfer by her escape the gift tax because no money value may be assigned to the marital rights she releases? A factual situation quite similar to the one assumed (without the tax angle) was recently presented to the Supreme Court of Florida in *North* v. *Ringling*, 149 Fla. 739, 7 So. 2d 476.

If a man who transfers property to his wife in settlement of her marital rights does not thereby make a gift but achieves a capital gain liable to be taxed as income, as has been repeatedly held (*Commissioner* v. *Mesta*, (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Halliwell*, (C. C. A. 2) 131 F. 2d 642), then it is difficult to see how money paid under prenuptial agreement for the relinquishment of similar rights may be classed as a mere gift. While, in the latter case, no question of capital gain enters the picture, a parity of reasoning must necessarily put all of such transactions in the same category, viz., that of arm's length business dealings for consideration and profit. In its effort to obtain revenue, the Treasury Department has not always been consistent in its positions.

But there is another and more compelling reason for believing that the wife's release of her marital rights may properly be considered and treated as a money's worth consideration and this is because of the case history of the subject as related to the enactment of the gift tax law.

As far back as 1924, the Court of Appeals for the Third Circuit decided in a case quite similar to this one, where the parties had made a prenuptial agreement and created a trust, that the transaction was of a business character, a *bona fide* sale or exchange, and that the dower rights released by the wife were consideration in *money or money's worth*, within the true intent and meaning of the federal statute, for the bonds delivered by

the husband to the trust. *Ferguson* v. *Dickson*, (C. C. A. 3) 300 Fed. 961.

The next decision was in 1927, the case of *McCaughn, Collector*, v. *Carver*, also by the Third Circuit, and reported in 19 F. 2d 126. It was there held that where the husband had made an irrevocable transfer of a fund in trust in consideration of the wife's relinquishment of her dower, a tax paid under protest was recoverable because the circumstances disclosed a *bona fide* sale for a *fair consideration in money or money's worth.*

Next came *Stubblefield* v. *United States*, decided by the court of claims in 1934, and reported in 6 F. Supp. 440. The suit was to recover an estate tax said to have been illegally assessed and collected under the Revenue Act of 1924. It was there held that when the wife of a grantor exacted a portion of the purchase price for surrendering her inchoate dower rights, the money received by her in the transaction was based on consideration and was not a gift. A similar holding had been made in 1926 by the District Court for the Southern District of Florida in the case of *Mason* v. *United States*, reported in 17 F. 2d 317.

While the several decisions above mentioned involved laws in effect prior to 1932, when the present gift tax statute was enacted, they are none the less valuable as precedents; for they dealt with *inter vivos* transactions alleged to have been without consideration, mere gifts, and effort was made to bring them within the scope of the statute taxing transfers other than those made *bona fide* and for a *money's worth consideration.* When the gift statute was enacted in 1932, Congress inserted substantially the same phraseology, *viz.*: "where property is transferred for less than an adequate and full consideration in money or money's worth" and it necessarily knew the federal courts had theretofore accorded to marital

rights the status of a money's worth consideration. Congress must be considered to have adopted the consistent interpretation theretofore placed upon the language it used, *United States* v. *Ryan*, 284 U. S. 167, 76 L. Ed. 224.

It is true Congress had in 1926 amended the estate tax law to specify that any such consideration should be "full and adequate" rather than merely "fair" but if such rights were a money's worth consideration before that amendment, as had been held, they were none the less so after it—the amendment merely served to impose upon the courts the duty of measuring and evaluating the consideration in each particular case. *Bristol* v. *Commissioner*, 42 B. T. A. 263; Hughes, Federal Death Tax, Section 240, page 493.

Since 1932 cases have arisen and decisions have been rendered which cast doubt and confusion upon the correct interpretation of the gift taxing statute.

The case of *Empire Trust Company* v. *Commissioner*, (C. C. A. 4) 94 F. 2d 307, was decided January 4, 1938. It involved an *estate tax* but should be mentioned because it has been cited as a precedent of some importance. We cannot see that it has any proper bearing upon or relation to the gift tax law. It is true the parties had there made a prenuptial agreement to fix the value of the wife's dower estate but nothing was paid her or agreed to be paid her by the husband unless she should survive him. He having died and the specified payment having been made to the widow, the executors asserted the payment as a deductible claim; this, however, was contrary to the estate law which expressly required that the gross estate include the value of any such dower interest. Because and only because of this express statutory provision the claim was held non-deductible. The court did not hold that dower rights released may not constitute a money's worth consideration for a contemporaneous *inter vivos*

transfer—it said in effect that that was not the case before the court.

We have previously referred to the B. T. A. decision in *Bristol* v. *Commissioner*, 42 B. T. A. 263. That case was quite similar to this and the board favored the taxpayer. We think its reasoning logical and its decision sound; but the First Circuit Court of Appeals thought otherwise, hence the reversal in *Commissioner* v. *Bristol*, (C. C. A. 1) 121 F. 2d 129. We believe this is the chief authority upon which the government can rely.

Without dwelling in detail upon the reasoning of the appellate court in the Bristol case but here noticing one of the principal theories therein advanced, we maintain that a valid and non-taxable transfer does not necessarily contemplate receipt by the transferor of something of equal money value, so as to leave his net worth as much as it was before the transaction was consummated. To so hold would be to re-define "consideration" by writing into the law a provision which Congress has not inserted —*U. S.* v. *Mitchell*, (C. C. A. 7) 74 F. 2d 571. In discussing the same point as related to estate taxes, Mr. Paul[12] says:

> "The courts have held, as a rule, that consideration need not flow directly to the decedent or to his estate."

And Mr. Hughes[13] says:

> "The law does not require that the consideration be paid to the donor in order that it may swell his estate and the court should not add such a provision to the law by judicial construction."
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> Citing, *U. S.* v. *Mitchell, supra.*

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[12]Paul on Federal Estate and Gift Taxation, Sec. 11.20, at page 602.

[13]Hughes, Federal Death Tax, Sec. 93, at page 152.

So, in the case at bar, the taxable nature of the transaction is not to be determined on the basis that while Mr. Merrill transferred funds to the trust, his wife merely relinquished her property claims. The question is whether the rights she released had a value to him commensurate with the property he transferred. The First Circuit Court of Appeals in the *Bristol Case, supra*, held such marital rights to be incapable of valuation in terms of money, but in so doing it departed from precedents and promulgated a new rule which other federal courts have since been unwilling to follow.

The tax court is far from convinced of the soundness of the reasoning in the Bristol case. Commenting thereon, it said in *Jones* v. *Commissioner*, 1 T. C. 1207:

> "We have not, however, departed from the view expressed in our opinion in that (Bristol) case."

To the same effect see the decision and reasoning in *Wemyss* v. *Commissioner*, 2 T. C. No. 111.

The views of the tax court are entitled to considerable weight upon questions of this character. *Dobson* v. *Commissioner*, ... U. S. ..., 88 L. Ed. 179.

In the *Wemyss Case, supra*, the tax court decision was rendered against the taxpayer, upon the peculiar facts there involved. On appeal however the case was reversed (*Wemyss* v. *Commissioner*, 144 F. 2d 78), and these propositions announced: (1) A transfer pursuant to prenuptial agreement is a *bona fide* business transaction, not a gift, (2) Such transfers are not in contemplation of death but of life, (3) The consideration requirement may be met by showing a detriment suffered by the wife; it is immaterial that no consideration flows directly to the husband for his transfer, (4) Such a detriment is definitely measurable in money or money's worth, (5) Before the government may tax for a gift, a donative intent must exist,

(6) The reasoning of the *Lasker Decision* (*infra*) concurred in and approved.

The Bristol case, on appeal was decided June 27, 1941, and on June 3, 1942, the same court (CCA-1) decided *Commissioner* v. *State Street Trust Company*, reported in, 128 F. 2d 618.

The issue in that case was said to be:

> "Whether a claim for monthly payments to a wife for life in satisfaction of her right to alimony or otherwise under a divorce decree which is subject to modification on her remarriage is an allowable deduction in a deceased husband's estate tax return under Section 303(a) and (d) of the Revenue Act of 1926, as amended."

It was there held that a decree by a Massachusetts Court, granting a divorced wife an annuity, created a liability on the part of the husband which was deductible for estate tax purposes, in spite of the fact that the decree really provided for the payment by the husband to the wife of amounts for her marital rights. The decision seems to have been upon the theory the statute contemplates that amounts paid for the relinquishment of marital rights are not deductible where the payments are founded upon a promise or agreement but may be deducted where the payment was founded on a decree of court.

If the reasoning of the State Street Trust Company case is sound, it would seem that if Mr. Merrill had not created the trust for Mrs. Merrill pursuant to the prenuptial agreement and she had brought an action for specific performance and he had been required by court decree to perform, there would have been no taxable gift inasmuch as he was required by the court to do what he had previously contracted to do. Since there is no provision in the gift tax law that relinquishment of marital rights may not

be good and sufficient consideration (whether this relinquishment be pursuant to agreement or a court decree) we fail to see why the parties should be penalized because they would not resort to the obvious subterfuge of having Mr. Merrill refuse to create a trust and then arranging for Mrs. Merrill to bring an action for specific performance and obtain decree ordering him to do so.

On December 4th, 1943, the Seventh Circuit Court of Appeals decided *Lasker* v. *Commissioner*, 138 F. 2d 989, where gift tax was sought to be imposed because the husband, shortly after marriage and preliminary to a divorce proceeding, made a cash settlement with the wife in discharge of an ante-nuptial agreement and in order to obtain release of her statutory marital rights. It was held that he received for the sums paid adequate and full consideration in money or money's worth within the gift tax statute and that the payment was not subject to gift tax. The court noticed not only the Bristol case, but also the Jones and Merrill cases, saying in part:

> "The Bristol case is predicated upon a holding (page 135) contrary to that of the tax court that a certain proviso directed expressly at the estate tax provisions is also applicable to the gift tax provisions.
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> The tax court, in *Jones* v. *Commissioner*, 1 T. C. 1207, decided subsequent to the instant case, again refused to follow the Bristol case, in the respect above stated."
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> • • • • • • •
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> "Not only has the tax court refused to follow the reasoning of the Bristol case, but so has the district court in *Merrill* v. *Fahs, Collector*, (D. C.) 51 F. Supp. 120. *We agree with the reasons given by the court in the latter case for its refusal to follow the Bristol case.*"

In the case at bar the district court considered (R. 52-57) that the release by Mrs. Merrill of her statutory rights might and did constitute a money's worth consideration for petitioner's transfer of funds to the trust and thereupon valued those rights to its entire satisfaction. Its calculation was based upon the admitted net worth of petitioner considered in the light of the respective ages and life expectancies of petitioner and wife and the actuarial formula introduced in evidence. As previously observed it was by the stipulation (R. 9) agreed: "that the formula and computation is correct, if it is possible to place a money value upon the wife's dower interest, under the facts in this case."

The Circuit Court of Appeals, reversing the District Court, held that the amount of the transfer should have been included in petitioner's gift tax return on the ground that the consideration for the transfer was not susceptible of accurate monetary measurement and therefore that its adequacy could not be and was not here established (R. 67-72). A dissenting member of the court was of the view (R. 72-77) that the consideration was susceptible of evaluation and that its adequacy had been established.

It would seem that we have here two questions which shade into each other; the one being the government's contention that such marital rights may not, within the contemplation of the statute, constitute consideration to *any* extent and the other being the view taken by the Fifth Circuit Court (majority opinion) that such rights, because of their future and contingent nature, are not susceptible of accurate mathematical measurement. It is possible that this is merely a distinction without a difference. The government contends, as we understand, only for the proposition stated by it; consequently we will refrain from discussing the great array of cases which deal with valuation problems where there is admittedly

some consideration of money's worth.[14] If the Circuit Court of Appeals considered the case to present merely a problem of measurement, then it erred in reversing the judgment because no such problem was presented to it —as has been observed we had stipulated with the government upon an appropriate valuation formula. Such a method of evaluation has often received judicial sanction and is approved of by the Treasury Department, Reg. 79, Art. 19; *Bristol* v. *Commissioner*, 42 B. T. A. 263; *Jones* v. *Commissioner*, 1 T. C. 1207; *Wemyss* v. *Commissioner*, 2 T. C. No. 111; *Lasker* v. *Commissioner*, (C. C. A. 7) 138 F. 2d 989; *Commissioner* v. *Hart*, (C. C. A. 3) 106 F. 2d 269; *Guggenheim* v. *Helvering*, (C. C. A. 2) 117 F. 2d 469; *Commissioner* v. *Mesta*, (C. C. A. 3) 123 F. 2d 986; *Commissioner* v. *Marshall*, (C. C. A. 2) 125 F. 2d 943; *Smith* v. *Shaughnessy*, 318 U. S. 176, 87 L. Ed. 504.

Furthermore, the record in this case (R. 6, 10, 11) shows that petitioner and Miss Desmare, each being represented by individual counsel, negotiated at arm's length and after full and fair disclosures of finances agreed upon an appropriate consideration to be paid by petitioner and received by his wife for her marital rights. The district court, after full consideration of the evidence, found that petitioner had benefited, financially speaking, by this exchange of properties. Under the circumstances we think, as the tax court thought in *Jones* v. *Commissioner, supra*, that section 503 "can scarcely mean that all arm's length business transactions, involving transfers of property, shall be subjected to scrutiny and, in every case where one party makes a bad bargain, he should have his misfortune increased by the imposition of a gift tax on his unfavorable balance from the transaction. The tax is imposed

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[14]Paul on Federal Estate and Gift Taxation, Volume II, Chapter 18.

by authority of section 501. It is expressly limited to transfers 'by gift.' 'Gift' is not defined in the statute. The respondent, however, has himself defined the term as used in the controlling statute as excluding arm's length business transactions, such as is evidenced here, in which there was no donative intent."

## CONCLUSION.

In the instant case, the theory of the district court in awarding judgment for petitioner was that the language of the gift law is plain, that Congress knew what it was doing when it used language different from that inserted in the estate law, that while each of those laws supplements the other no complete integration of their provisions was intended, that only gifts and not *bona fide* property exchanges were intended to be taxed, that the release by a wife of her statutory rights for a contemporaneous cash consideration paid her by the husband may be a *bona fide* property exchange and such rights of the wife are susceptible of valuation in terms of money, that the courts should not abdicate their function of deciding valuation questions merely because mathematical accuracy in the result may be difficult. Upon a consideration of all of the evidence in this case it found that the particular rights relinquished by Mrs. Merrill were a full and adequate equivalent in money's worth for the sum transferred by petitioner to the irrevocable trust.

We think the theory and reasoning of the district court was sound and submit that the Fifth Circuit Court of Appeals erred in reversing the trial court's judgment.

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## APPENDIX.

Revenue Act of 1932, c. 209, 47 Stat. 169:

### TITLE III - GIFT TAX.

SEC. 501. IMPOSITION OF TAX.

(a) For the calendar year 1932 and each calendar year thereafter a tax, computed as provided in section 502, shall be imposed upon the transfer during such calendar year by any individual * * * of property by gift.

(b) The tax shall apply whether the transfer is in trust or otherwise, whether the gift is direct or indirect, and whether the property is real or personal, tangible or intangible; * * *

* * * * * * *

SEC. 503. TRANSFER FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Where property is transferred for less than an adequate and full consideration in money or money's worth, then the amount by which the value of the property exceeded the value of the consideration shall, for the purpose of the tax imposed by this title, be deemed a gift, and shall be included in computing the amount of gifts made during the calendar year.

Revenue Act of 1932:

### TITLE VI - ESTATE TAX AMENDMENTS.

SEC. 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

Section 303 (d) of the Revenue Act of 1926 is amended by adding at the end thereof a new sentence to read as follows:

"For the purposes of this title, a relinquishment or promised relinquishment of dower, curtesy, or of a statutory estate created in lieu of dower or curtesy, or of other marital rights in the decedent's property or estate, shall not be considered to any extent a consideration 'in money or money's worth.'"

**Excerpt from Congressional Committee Reports, 72d Congress, Revenue Bill of 1932.**

TITLE III - GIFT TAX

SECTION 503. TRANSFERS FOR LESS THAN ADEQUATE AND FULL CONSIDERATION.

Since the tax is designed to reach all transfers to the extent that they are donative, and to exclude any consideration not reducible to money or money's worth, it is provided in this section that where the transfer is made for less than an adequate and full consideration in money or money's worth, the excess in value of the property transferred over such consideration shall be deemed a gift. For example, if A sells property worth $10,000 to B for $1,000, there is a gift of $9,000.

TITLE VI - ESTATE TAX AMENDMENTS.

SECTION 804. RELINQUISHMENT OF DOWER, ETC., AS CONSIDERATION.

This amendment excludes, in determining "consideration in money or money's worth," the value of a relinquished, or a promised relinquishment of, dower, curtesy, or other marital rights in decedent's property. Section 302 (a) and (b) of the 1926 act require the value of such an interest to be included in the gross estate, and, if its value may, in whole or in part, constitute a consideration for an otherwise taxable transfer (as has been held to be so), or an otherwise unallowable deduction from the

gross estate, the effect produced amounts to a subversion of the legislative intent expressed in section 302 (a) and (b).

For example, a decedent dies leaving an estate of $1,500,000 (after payment of all charges), and under the State law the surviving spouse is entitled to one-third, or $500,000, of which she can not be deprived by will without her consent. Under existing law, the estate is entitled to no deduction on account of her statutory rights, but, if she and decedent had entered into a contract by which she was to receive from his estate a stated sum in consideration of a waiver of her statutory rights, the amount due her under the contract might be held a deductible claim against the estate as having been contracted for an adequate and full consideration in money's worth, namely, the value of her waived marital rights.

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Treasury Regulations 79 (1936 ed.):

> Article 1. *Imposition of tax.*—* * * The tax is not limited in its imposition to transfers of property without a valuable consideration, which at common law are treated as gifts, but extends to sales and exchanges for less than an adequate and full consideration in money or money's worth. * * *
>
> Art. 8. *Transfers for a consideration in money or money's worth.*—Transfers reached by the statute are not confined to those only which, being without a valuable consideration, accord with the common law concept of gifts, but embrace as well sales, exchanges, and other dispositions of property for a consideration in money or money's worth to the extent that the value of the property transferred by the donor exceeds the value of the consideration given therefor. However, a sale, exchange, or other transfer of property made in the ordinary course of business (a transaction which is *bona fide*, at arm's length, and free

from any donative intent), will be considered as made for an adequate and full consideration in money or money's worth. A consideration not reducible to a money value, as love and affection, promise of marriage, etc., is to be wholly disregarded, and the entire value of the property transferred constitutes the amount of the gift.

**The Florida Statute.**

Section 5507(1), C. G. L., as it was in effect at the date of the prenuptial agreement, read as follows:

"5507(1). Dower in realty and personalty.—Whenever the widow of any decedent shall not be satisfied with the portion of the estate of her husband to which she is entitled under the law of descent and distribution or under the will of her said husband, or both, she may elect, in the manner hereinafter provided, to take dower, which dower shall be one-third part in fee simple of the real property owned by her husband at the time of his death or which he had before conveyed, whereof she had not relinquished her right of dower as provided by law, and one-third part absolutely of the personal property owned by her husband at the time of his death, which said dower, both real and personal, shall be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges, and expenses of administration: Provided, however, that if a decedent be survived by his widow and lineal descendants and that none of such lineal descendants are also the lineal descendants of such widow, then the dower shall be limited to the portion of the estate of the decedent to which the widow is entitled under the law of descent and distribution, to-wit, a child's part, which said dower shall also be free from all liability for the debts of the decedent, all estate and inheritance taxes and all costs, charges and expenses of administration: Provided, further that nothing herein contained shall be construed as impairing the

validity of the lien of any duly recorded mortgage or the lien of any person in possession of personal property. The homestead shall not be included in the property subject to dower but shall descend as otherwise provided in this law for the descent of homesteads (Ch. 16103, Acts, 1933, Sec. 35; Ch. 17171, Acts, 1935, Sec. 1; Ch. 18066, Acts, 1937, Sec. 1)."

**Dower in Florida—Interpretation.**

The following excerpts are from *Smith* v. *Hines*, 10 Fla. 258:

"So it is the opinion of this Court, that in this State the law—that is to say, the common law and statute—by its own silent operation, raises a provision for the wife in the event of her surviving her husband, independent of, and without reference to, the agreement of the parties; consequently, the right of the wife to dower is not derived through the husband, but by provision of law. It is an interest which the law casts upon the wife."

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"A right to dower is an interest contingent during the life of the husband, but rendered absolute by his death. Now, our statute having extended dower to personal estate, she has the same inchoate estate in personal property that she has in real, excepting, in personal estate, it is not provided she shall have it in that which he 'had before conveyed,' as in lands; but, in the 3d section, providing the manner of proceeding to have dower set apart, it is stated that the sheriff and commissioners 'shall also, at the same time, allot and set off to such widow her portion of the personal estate of which her husband died possessed.' From this view, it follows that the right of dower in personal property, in this State, is an inchoate interest, contingent during the life of the husband, but rendered absolute by his death. The right is of a double contingency, viz.: he may, before death, sell or give it away, and she may not survive him.

"If we are correct in our definition of the interest of the wife, by way of dower in personal property, it seems clear that the question, whether her husband has or has not *bona fide* conveyed or sold his personal property, is one that she can contest—certainly as much as the widow can, in those States where dower in lands is only given in those lands of which the husband shall die seized and possessed. In the latter, the books are full of decisions that the widow may contest whether her husband has, in his life-time, *bona fide* conveyed."

* * * * * * *

"Thus it will be seen that, under our statute, the right of dower or dower interest of the widow, in the personal estate of her husband, are preferred rights—her claim stands higher than that of a creditor. If, then, the widow has a right to dower, which is cast upon her by law, and if that right is a preferred one—one that stands above all other claims, even higher than creditors—we ask, does she derive this right through her husband, the intestate, as in the case of an heir or administrator? We think not. It seems to us her claim is antagonistical to the estate of her husband—she had a contingent lien before his death. The principle under which an heir or administrator cannot set up title against voluntary deed of ancestor, is because the administrator stands in the place of the intestate, and has no greater or other rights than the person he represents, and the heir derives through the ancestor and has no greater or other right than the ancestor, and, in both cases, they had no inchoate title before his death. The ancestor could not avoid a gift made by covin and fraud, although under the statute of 13 Eliz., which we have enacted in this State, it would be void as to creditors—so cannot the heir or administrator, because they represent the ancestor, and because they had not, in his life-time, even an inchoate interest. But, it may be asked, does not the widow, like the heir, get her share out of the personal property left by the hus-

band? The answer is, that although, like the heir, she takes it out of the estate left by the husband, yet, unlike the heir, she cannot have her claim defeated by last will and testament, nor does she receive it under the law of descent and distribution. No doubt any *bona fide* sale or gift of personal property, made by the husband in his life-time, would affect the wife's claim for dower, as it would be binding upon the heir. We do not wish to be understood as intimating or asserting that the husband is restricted by any claim which the law casts upon the wife as dower, from making sale or gift of his personal property during his life-time, providing it is not done by will; but we do hold that such sale or gift must be a *bona fide* one—not a sham or pretence of sale or gift—and one which the husband cannot take back, and is not to take effect, in case some specified event does not happen."